

**Advisory Action
Before the Filing of an Appeal Brief**

Application No. 10/790,617	Applicant(s) BOGA ET AL.
Examiner JACQUELINE DIRAMIO	Art Unit 1641

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 13 August 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 2 months from the mailing date of the final rejection.
 b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
 Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because:
 (a) ☒ They raise new issues that would require further consideration and/or search (see NOTE below);
 (b) ☐ They raise the issue of new matter (see NOTE below);
 (c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
 (d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: See Continuation Sheet (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
 5. ☐ Applicant's reply has overcome the following rejection(s): _____.
 6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
 7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
 The status of the claim(s) is (or will be) as follows:
 Claim(s) allowed: None.
 Claim(s) objected to: None.
 Claim(s) rejected: 16, 18-21 and 39-48.
 Claim(s) withdrawn from consideration: None.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
 9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
 10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: See Continuation Sheet.
 12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
 13. ☐ Other: _____.

/Bao-Thuy L. Nguyen/
Primary Examiner, Art Unit 1641

Continuation of 3. NOTE: Applicant's amendment to claim 43 requires further consideration and a new search, given that this amendment requires a particular structure not previously considered.

Continuation of 11. does NOT place the application in condition for allowance because: of the reasons presented in the previous office action. In particular, Applicant argues (see pages 5-8) that it would not have been obvious to combine Daniels et al. with Miller et al. and/or Caillouette because (1) one would not modify Daniels et al. with a reference for detecting food spoilage, i.e. Miller et al.; (2) a rationale must exist for the combination; and (3) the fundamental principle of assay of Daniels et al. is vastly different from the system of Miller et al. However, these arguments are not found persuasive.

With respect to Applicant's first and second arguments, motivation and rationale exist for the combination of Daniels et al. in view of Miller et al. and Caillouette. The claims are drawn to a device for detecting multiple analytes, one of which is an amine and the other appears to be a biological analyte though it is not specifically defined in claim 16. As such, Daniels in view of Miller and Caillouette makes obvious the claimed invention for the reasons presented in the 103(a) rejection. The argument that the method of Miller is only concerned with foodstuff and is different from the biological samples discussed by Daniels is not persuasive. First, it is noted that these are analogous art, i.e. they are both directed to immunological assays to detect biological analytes though in different types of samples. Second, any need or problem known in the field of endeavor at the time of the invention and addressed by the application can provide a reason for combining the elements in the manner claimed. And lastly, the claims do not specifically state the type of samples, thus this argument is not on point.

Daniels teaches a device appropriate for detecting multiple analytes (see paragraph [0008]). However, Daniels fails to teach the detection of amines using a triarylmethane dye. However, this is taught by Miller and Caillouette. Miller teaches assay and reagents for detecting amines in foodstuff and Caillouette teaches the use of triarylmethane dyes for detecting amines.

Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to modify the device of Daniels to detect more than one analyte including amines using appropriate reagents such as the triarylmethanes taught by Caillouette because of the reasons provided by Miller et al. wherein Miller et al. teach that a device that comprises an indicator dye that undergoes a color change in the presence of amines provides an effective means to indicate the presence of an unwanted biological agent, such as bacteria or fungi, in a sample, particularly a food sample, by colorimetric detection of amines. Further, a skilled artisan would have had a reasonable expectation of success in placing the reagents taught by Caillouette and Miller on the device of Daniels in order to detect amines in a sample because Daniels teaches that its device may be used to detect a variety of analytes using appropriate reagents (see paragraphs [0191] and [0193]).

In addition, Daniels teaches the detection of multiple analytes in a single sample or in multiple samples and teaches that appropriate reagents may be incorporated in the device dependent on the purpose of assay, and Miller teaches the detection of amines using a colorimetric reagents and Caillouette teaches the use of trimethylmethane dyes for detecting amines using a porous body. Therefore, a skilled artisan would have had a reasonable expectation of success in placing the triarylmethane dye taught by Caillouette in the device of Daniels to detect amines in a test sample since such a combination would be a combination of prior art elements according to known methods to yield a predictable result.

With respect to Applicant's last argument, the differences in the systems or flow of the sample in the Daniels et al. reference as compared to that in the Miller et al reference is not persuasive because it is not considered relevant. The claims are directed to a device and each and every limitation of the claims is taught by Daniels et al. in view of Miller et al. and Caillouette. Further, as discussed above and in the previous office action, a motivation and rationale for this combination is presented. Therefore, it is irrelevant how the flow of the sample is different since this is not recited in the claims. In addition, the systems are not considered that vastly different and are actually considered analogous art, given that both Daniels et al. and Miller et al. are directed to immunological assays to detect biological analytes.